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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1906.

No. 194.

THE UNITED STATES, EX RELATIONE, WILLIS C. WEST,
PLAINTIFF IN ERROR,

vs.

ETHAN A. HITCHCOCK, SECRETARY OF THE INTERIOR,
DEFENDANT IN ERROR.

Brief for Plaintiff in Error.

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BRIEF FOR PLAINTIFF IN ERROR.

This case was commenced by a petition to the Supreme Court of the District of Columbia for a writ of mandamus to compel the Secretary of the Interior to approve the selection by the relator in said court of a certain tract of land in the Wichita Reservation in the Territory of Oklahoma. The defendant in error, the Secretary, demurred to the original petition and the demurrer was sustained. From this order the relator appealed to the Court of Appeals of the District of Columbia, where the

judgment of the Supreme Court of the District was reversed (19 Appeals D. C., 333). The Secretary then filed an answer in the Supreme Court of the District (Rec., p. 10) and the relator moved for the issuance of a peremptory writ, notwithstanding the answer, and the motion was denied (Rec., pp. 12, 13). The relator then demurred to the answer and the demurrer was overruled (Rec., pp. 12, 14). The relator then traversed the return by four separate pleas to which the Secretary in turn demurred. The court overruled the demurrer to the first plea and sustained it to the second, third and fourth (Rec., pp. 13, 16). The Secretary then joined issue upon the first plea; evidence was presented by both parties and the case submitted to the court without a jury. The court rendered a judgment, denying the writ, and from that judgment an appeal was taken to the Court of Appeals of the District of Columbia; that court having affirmed the judgment of the court below, a writ of error was sued out, bringing the cause into this Court. The material allegations of the petition are as follows:

The Petition.

On June 4, 1891, an agreement was made between the Wichita tribe of Indians and the United States, by which the said tribe ceded its lands to the United States. Out of these lands, however, there was first to be allotted to each member of the tribe, native and adopted, not to exceed 1,060, a tract of 160 acres. The relator was one of the signers of this agreement for and on behalf of the

tribe and as a member thereof. The agreement was ratified by the Act of Congress, March 2, 1895 (28 Stat. L., 876, 910). If the agreement provided that the native and adopted members of the tribe in the selection of their lands were to take tracts one-half of which should be arable and the other half grazing lands. It provided that certain areas should be set apart for public purposes; that within these areas selection might not be made except by those members of the tribe who had previously improved lands therein. It gave to every member of the tribe the undisputed right to select for his allotment the tract on which he had made improvements, no matter where it was situated. It provided that after the tract had been selected and taken and approved by the Secretary of the Interior, the United States should hold the lands in trust for the allottee for the term of 25 years, at the end of which time the allottee (or his heirs) was to be vested with an indefeasible title. The lands remaining after the allotment were to be open to settlement under the homestead laws of the United States. The number of the members of the tribe and its affiliated bands, native and adopted, entitled to allotment will not exceed, but will fall below, one thousand and sixty.

The relator is a white man, over the age of 21 years, a citizen of the United States and resident in the Wichita Reservation in Oklahoma. Long prior to 1891 he married a woman who was by blood a member of the Wichita tribe. By reason of this marriage he became an adopted member of the tribe according to its estab-

lished usages and customs, and, since his marriage, has been continuously recognized as such by both the tribe and the United States authorities. At the time of the negotiation of the agreement hereinbefore referred to, the tribe, in council assembled, formally and solemnly adopted and recognized the relator as a member of the tribe, and he then signed the agreement referred to.

Again, on May 21, 1901, in the presence of the agent of the tribe, the relator was by the tribe formally confirmed and recognized as an adopted member. Prior to that date the relator had been enrolled for and regularly paid his *per capita* share of the tribal funds, at the same time and in the same manner as his fellow tribesmen were paid, and had been enrolled on the census roll of the tribe by the United States Indian agent as a member thereof. After the making of the agreement of June 4, 1891, the relator duly selected 150 acres of land, more particularly described in the petition, being a tract upon which he had made valuable and permanent improvements, and in all other respects subject to selection by him. He made application to the Secretary of the Interior for the approval of this selection and the Secretary declined to approve it.

The reservation was opened to settlement on the 6th day of August, 1901. On the day preceding this relator filed in the Supreme Court of the District of Columbia a petition for a writ of *mandamus*, alleging, among other things, that by reason of the location and the improvements thereon the tract selected by relator would be entered by some one entitled to enter land after the pro-

vision for the opening of said land for settlement went into effect.

The Answer and Plea.

The Secretary in his answer does not deny a single fact set up in the petition. His defense is contained in the statement that at the time of the application of relator to him he had no knowledge respecting him, either as to his nativity or adoption as a member of the Wichita tribe, and has obtained no knowledge since on said subject, except such as was obtained in the course of his official examination and consideration of the application for allotment with the view to its approval or disapproval, and in order to properly discharge his duty in the premises the Secretary of the Interior examined and considered the said application and all evidence and proofs presented by or on behalf of the relator, and also such other evidence and proofs bearing thereon as were embodied in the public records and files in the Indian Bureau and in the Department of the Interior, and upon consideration of all such evidence and proof the Secretary did, on July 3, 1901, reach and announce a conclusion and decision that the relator was not by nativity or adoption a member of the Wichita and affiliated bands of Indians, and for that reason was not entitled to an allotment in the premises, and he therefore denied his application for the same (Rec., pp. 10, 11).

The plea of relator upon which the appellee joined issue was in these words:

Relator says that the defendant, as Secretary of the Interior, did not, by the decision alleged in the answer to have been made by him on July 3, 1901, decide that the relator was not by nativity or adoption a member of the Wichita or affiliated band of Indians, and for that reason denied him the said allotment (Rec., p. 14).

Both the relator and the Secretary submitted evidence in support of their several contentions, which is set out in full in the bill of exceptions (Rec., pp. 22–45).

The relator objected to the competency of all of defendant's evidence, for reasons which will hereinafter more fully appear, and excepted to the rulings of the court admitting it.

Specification of Errors.

The plaintiff in error says that the Supreme Court of the District of Columbia erred—

1. In not issuing a peremptory writ, notwithstanding the answer.

2. In overruling the relator's demurrer to the answer.

3. In sustaining the defendant's demurrer to the relator's second, third, and fourth pleas.

4. In admitting the evidence submitted by the defendant.

5. In denying the writ of mandamus.

And the plaintiff in error says that the Court of Appeals of the District of Columbia erred—

1. In not reversing the judgment of the Supreme Court

of the District of Columbia, because of the errors of that court herein above assigned.

Motion for Issuance of the Writ and the Demurrer.

The relator contends that either the motion for the peremptory issuance of the writ, notwithstanding the answer or the demurrer to the answer, should have been allowed or sustained by the trial court. These two forms of pleading seem, in most jurisdictions, to perform the same function (Silverthorn *vs.* Warren R. Co., 33 N. J. L., 173; *ex parte* Newman, 14 Wall., 152). If there is any distinction between them, it is that where the motion for the writ is granted, the respondent has no opportunity to amend and cure the defects of his return. If the demurrer is sustained this opportunity may be afforded him. Fearing that the court might hold the return to be only defective because it was not full enough, the relator deemed it wiser to demur also. The reasons for granting the motion and for sustaining the demurrer are the same and they will be considered together.

It is a well settled principle for which authority is scarcely necessary, that the allegations of the petition which are not denied, or which are insufficiently answered, must be held to be admitted by the respondent. The petition in this case alleges that the relator is an adopted member of the Wichita tribe and was a member long before Mr. Hitchcock was Secretary of the

Interior. It sets out in detail the facts upon which this allegation is based. The relator is a member of the tribe by its ancient usage and custom in admitting to membership those persons who were married to members of the tribe. The answer does not deny this usage and custom. The membership of the relator has been recognized more than once by formal action of the tribe and always by the Interior Department, until about the time of this application by him for approval of his selection of land. The petition shows that the tribe affirmed his membership at the time of signing the agreement of June 4, 1891, and that he was a signer on behalf of the tribe of that agreement. It shows also that his membership was reaffirmed by vote of the tribal council, May 21, 1901. It shows that the Department recognized him as a member by treating with him for the agreement of June 4, 1891, and by carrying him upon the rolls of the tribe and paying him his per capita share of the tribal fund at the same time and in the same manner as other members of the tribe were paid (Rec., pp. 4 5).

The answer does not deny any of these facts in detail, nor does it specifically deny the conclusions that the relator is an adopted member of the tribe. In the language of the Court of Appeals, considering the first appeal of this case (West *vs.* Hitchcock, 19 App. D. C., 333), no denial "well could be made (of the adoption), in view of the well established custom of the Indians for over two hundred and fifty years, to admit white men into membership of their several tribes by the process of adoption, and in view of the uniform recognition of this custom by

the Government of the United States." What is now contended to be the denial of the Secretary in his answer is contained in these words:

> He considered the said application of the relator and all evidence and proof presented by or in behalf of the relator in support of such application, including each and all of the matters set forth in the petition herein in support of such application, and also such other evidence and proofs bearing thereon as was embodied in the public records and files of the Indian Bureau and in the Department of the Interior, and upon full consideration of the said application of the relator and of all such evidence and proofs this defendant, as Secretary of the Interior, did on the 3d day of July, 1901, reach and announce a conclusion and decision that the relator was not by nativity or adoption a member of the Wichita and affiliated bands of Indians.

This answer must be held by the Court to be an admission that the averments of the petition as to the adoption are true.

> Creager *vs.* Hooper, 83 Md., 490; People *vs.* Ovenshine, 41 How. Pr. (N. Y.), 164; People *vs.* Crab, 156 Ill., 155.

Holding the averments of the petition then to be true, there was no disputed question of fact before the Secretary, about which he had the right to exercise discretion, or upon which he could decide that the relator was not an adopted member of the tribe.

Both the courts below seem to us to have given undue

weight in respect of this to the case of Riverside Oil Co. vs. Hitchcock (190 U. S., 316), for we submit that is a case essentially different from this. That was a case where the Commissioner of the Land Office and the Secretary of the Interior had refused to approve selections of land made by the petitioner in that case, in lieu of some lands lying within forest reservations which he had previously surrendered to the United States. In that case, several disputed questions of fact were submitted to the Department, for the solution of which the judgment and discretion of the Secretary and the Commission were necessary. It was an open question whether the lands selected were vacant at the time of the selection. It was a question whether or not they were mineral lands, and there were other questions calling for the exercise of Departmental discretion. Having these facts in view, Mr. Justice Peckham, in his opinion, says:

> "Upon a perusal of the record it appears that those questions are not merely formal ones, nor are they so plain as not to require the careful judgment of any tribunal to which they may be referred for decision. Their solution was properly submitted to the Land Department, which had full and complete jurisdiction over the matters arising under the act of June 4, 1897, and it thereby became the duty of the officers of that Department to decide them. * * * Congress has constituted the Land Department, under the supervision and control of the Secretary of the Interior, a special tribunal with judicial function, to which is confided the execution of the laws which regulate the purchase, selling and care and disposition of the public lands.

> "Neither an injunction nor *mandamus* will lie against an officer of the Land Department to control him in discharging an official duty which requires the exercise of his judgment and discretion."

In the case at bar we submit that the allegations of the petition which are not denied by the answer, show that the adoption of the relator into the tribe was complete and his membership fully vested long before his application to the Secretary for approval of his selection for allotment was made, and this being true, no room was left for the exercise of discretion or judgment by officers of the Department in respect of relator's membership in the Wichita tribe. We concede that the case cited would be applicable if the answer had denied the identity of the relator or had denied the facts set up as determining his membership in the tribe, but the Secretary, having conceded these facts by his answer, it was his plain ministerial duty to approve the selection by relator, as by other members of the tribe, native and adopted. Any other course was purely arbitrary conduct. If this contention is correct, the Secretary has failed in the performance of a mandatory duty imposed upon him by the statute, and the writ should have issued without further proof on the part of the relator.

Argument on the Evidence.

The only evidence offered by the relator after the denial of the motion for the issuance of the writ and after the demurrer was overruled, was a copy of the

decision of the Secretary of July 3, 1901 (Rec., pp. 23–24), which fully sustains the allegations of relator's petition and equally disproves the return of the Secretary that he did "reach and announce a conclusion and decision that the relator was not by nativity or adoption a member of the Wichita and affiliated bands of Indians, and for that reason was not entitled to an allotment under the agreement so ratified."

We commend this decision to the Court as a shining example of Departmental jurisprudence. It recites that relator is married to a Wichita woman and that his membership in the tribe has been formally recognized by vote of the tribe in council. It recites relator's residence with the Indians since 1882 and marriage into the tribe in 1891, and almost in the same breath says that he does not live with the tribe. It denies his application because he does not show any consideration or services rendered to the tribe such as should entitle him to receive benefits with it, an averment that probably could be made with equal force in passing upon the application of many native members of the tribe who have been a burden rather than a benefit to the tribal body. Another reason given for the refusal is that the relator "seems well-to-do." Consolation, however, is given him by the promise that his wife and children will receive allotments. Although it is outside the record, we cannot refrain from saying, upon the absolute knowledge of one of our number, that the relator and his wife have never been blessed with any children. Whether or not the promise has been fulfilled as to the

wife the record does not show, but it does show that neither the husband or wife has received the land here in question to which as their homestead they had the "undisputed right" under the terms of the agreement and statute. This is the decision to which the Secretary refers in his answer, when he gravely informs us that he did "reach and announce a conclusion and decision that the relator was not by nativity or adoption a member of the Wichita and affiliated bands of Indians." We respectfully submit that in so far as this decision goes to the question of relator's membership in the tribe, it concedes it.

The application pending before the Secretary did not ask him to decide whether relator had ever been adopted into the tribe by usage and custom, or by formal tribal action. The only question that was before him was whether or not the selection for allotment made by the relator conformed with the provisions of the agreement and statute, and the only question which he decided, or could decide, was that he would not approve relator's selection, and he decided this, although he admitted in the same decision that the relator was a member of the Wichita tribe.

The evidence submitted for the Secretary consisted entirely of records and correspondence taken from the files of the Interior Department. They confirm in almost every particular, and in no case do they disprove the allegations of the petition.

We objected and excepted to the ruling of the court in admitting these records because they did not support

any averment or denial of the Secretary's answer, and we now insist that their consideration by the court was error. In so far as they are confined to the matters referrrd to in the petition and the answer, they entirely support the allegations of the petition. They show that the relator had married a Wichita woman and was one of the signers of the agreement of June 4, 1891, on behalf of the tribe, and was at that time recognized by the tribe and by the officers of the United States as a member. They show that his name was duly entered upon the grass payment rolls of the tribe and that he received from time to time his per capita share of grass moneys paid the Wichita tribe; that his name continued to appear upon said tribal roll until February 10, 1898, when it was stricken off, not by order of the Secretary, but by the Kiowa Indian Agent (Rec., p. 32). In addition, they show why this ill-considered and unauthorized action of the agent was taken.

It appears (Rec., p. 28) that some time prior to February 19, 1894, certain persons, not members of the tribe, applied to it for adoption as members and the tribe had expressed its desire for their admission. It does not affirmatively appear that the relator was one of these, but subsequent proceedings, hereafter to be referred to, indicate that without his knowledge his name was included in the number. The Department, not believing that it had the power to approve or disapprove an adoption, or being unwilling to exert it, resorted to other means and instructed the agent that there was "nothing to show that the council was a proper one; that it had

any authority to act; that it represented the tribes, or that its action expressed the wishes of the majority"; and directed the agent to call another council and especially call to the attention of and make clear to that council the fact that "for every allotment taken in excess of 1,060 a reduction will be made from the purchase price paid them for each allotment taken in excess at the rate per acre allowed for their surplus" (Rec., p. 29), and this was to be explained to the Indians, although, so far as this record shows, there was no likelihood of the number of allotments exceeding, or even reaching, 1,060. The council thus called by the agent met on February 21, 1895 (Rec., p. 30), and was attended by a membership of only 35 out of the whole number of the tribe, and the name of the relator was rejected—13 ayes and 17 nays. The relator was already a member of the tribe; his membership had never been questioned by the United States or by the tribal authorities, and his name was presented to the tribe for adoption without his knowledge or consent, and, as he claimed at the time, had no bearing on his rights (Rec., p. 35). He thereupon moved the tribe to rectify the injustice done him, and on March 23, 1897 this was done by a vote of 92 in his favor and 24 opposed (Rec., p. 36). On June 5, 1897, the agent recommended to the Department the disapproval of the adoptions of this council, and on February 7, 1898, the Department disapproved them all and directed the agent to "inform all the parties interested of this action in the premises." Although it does not appear that relator was individually referred to by this direction, the agent seems to have

construed it as authority to strike his name from the grass payment rolls and acted accordingly (Rec., p. 32). That these proceedings were the natural mistakes of an unlettered people and had no bearing upon the right of the relator, is evident to us, and we would not refer to them now, but for the impression they seem to have made upon the Court of Appeals, for it says:

> "It would seem that these various conflicting tribal actions were such as would require the Secretary of the Interior, in determining whether the relator was entitled to an allotment of land, to exercise judgment, and that it was not a mere ministerial duty which he was called upon to perform."

We shall contend that with this action of the tribe, mistaken or otherwise, the Secretary had no other concern than to recognize it as determining the status of the relator in the tribe. Whether the tribe acted under a mistaken apprehension of the facts or not, in the first council, the result of the second council certainly determined that relator was a member of the tribe, and this was reaffirmed May 21, 1901, as shown by the Secretary's decision of July 3, 1901. The entire evidence in the case shows that the membership of the relator in this tribe as early as this record begins, was recognized by the tribe and by the United States in every transaction until he was by mistake stricken from the grass payment roll, in February, 1898, by the agent at the Kiowa agency. With tastes evidently more suited to Indian tribal life than to the habits and customs of his own people, he had gone among these Indians as early as 1882. He had

married one of their women, acquired membership in the tribe and made his home with them. Undisturbed in his tribal membership by anyone in authority, he had long before selected the land here in question and made many valuable improvements on it to fit it for a home for himself and his wife, where they might pass the remainder of their days. Secure in the knowledge of his vested rights, he had co-operated on behalf of his fellow tribesmen, with the officers of the United States in the negotiation of an agreement which had added a very large area to the public domain; had secured to himself and his fellow tribesmen the right to individual ownership in their homes, and had in every way rendered more satisfactory the relations between his tribe and the Government. So long as his services in negotiating the agreement were necessary and his influence with the other Indians was desirable, his title to tribal membership was clear enough and strong enough to satisfy the most jealous guardian of tribal rights to be found in the Indian Office. Only when the need for him was past and when he demanded his part of the consideration for the grant of these lands was it discovered by the Interior Department that it was the function of the Secretary and not of the tribe in council to determine who was and who was not of its membership. And this function, although so earnestly claimed in behalf of the Secretary now, had been so rarely exercised prior to the time when the relator was stricken from the grass payment rolls that although the Secretary, over our objection and exception, submitted several papers showing that at times the Department

had exercised this function, it could only be shown to have been exercised once prior to September 8, 1900. And the regulations of the Department contained no provision for approval of adoption by the Secretary until December 28, 1893.

Jurisdiction of the Secretary in the Matter of Adoption.

We know of no authority for this interference by the Secretary with the internal affairs of an Indian tribe. The duties of the Secretary and the Commissioner are defined by Sections 441 and 463, Revised Statutes.

> SEC. 441. The Secretary of the Interior is charged with the supervision of public business relating to the following subjects:
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> * * * * * * *
>
> THIRD—THE INDIANS.
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> * * * * * * *
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> SEC. 463. The Commissioner of Indian Affairs shall, under the direction of the Secretary of the Interior, and agreeably to such regulations as the President may prescribe, have the management of all Indian affairs, and of all matters arising out of Indian relations.

We contend that by the terms of these statutes the management and supervision contemplated to be exercised by the Secretary and the Commissioner is limited to matters pertaining to the "relations" of the tribe to the United States, and that its extension to matters pertaining solely to the internal affairs of the tribe, is not only without authority of law, but is a gross violation

of the Government's duty to the tribe and its members, and this contention has been fully sustained by the courts.

The failure to observe this distinction, we think, has resulted in errors in both the courts below. The trial court made two special findings of fact which, in their last analysis, were really conclusions of law. One was that the Secretary made a decision that the relator was not by nativity or adoption a member of the tribe; and the other, that the Secretary had disapproved the application of relator for membership.

As we have already shown, these findings are contrary to the evidence in the case, and were manifestly based by the court below on his conviction that the relator could not become or remain a member of the tribe without the consent of the Secretary. This we insist is error for which the decision should be reversed, although it seems to have had weight with the Court of Appeals on the second appeal.

Mr. Justice Duell, in his opinion, says:

> "If the Secretary of the Interior was vested with authority to decide whether the relator was entitled to an allotment under the agreement of June 4, 1891, and the statute ratifying it, then the performance of that duty was not a ministerial one, but required the exercise of judgment and discretion, and is not reviewable by the Court, even though it may seem that his determination is an erroneous one. We think there is no question but that such power was vested in him. Secs. 441 and 463 of the Revised Statutes give to the Secretary of the Interior

> management of all affairs of the Indians and of all matters arising out of their relations. The power of Congress to deal with the Indians is of the most sweeping character, and it has been recognized and affirmed by the Supreme Court from the earliest days down to the present time."

We respectfully submit that this is beside the question. This Court has long since settled that the power of Congress in dealing with the Indians is subject to practically no limitation, but the powers of the Secretary under Sections 441 and 463 have not been so sweepingly defined, and this Court has never held that the Secretary has this power under these sections. In every case where an executive officer of the Government has been held to have the power to determine who were entitled to membership in tribes, the power has been derived from an act of Congress specifically creating it, and this is shown by the cases cited by the learned Justice in the courts below. But aside from this, we submit that the question presented in both the courts below was not whether the Secretary had jurisdiction to approve or disapprove of an original application for membership in a tribe. The relator was a member of the Wichita tribe of Indians and had vested political and property rights therein long before this agreement was ratified and long before July 3, 1901, when it is claimed that the Secretary decided that he was not a member. Whatever power under Sections 441 and 463 the Secretary may have with respect of the approval of adoptions, no court has ever decided, nor has any executive officer claimed

that he has power to expel from the tribe a person whose membership has become fully vested.

Our contention here is, and was in the court below, that when Congress enacted the agreement of June 4, 1891, into law, and provided for 1,060 allotments, 1,060 was the total tribal membership, native and adopted, including this relator. This relator being then a member of the tribe, his allotment was there expressly provided for and his right to an allotment as an adopted Indian became individually vested, so that surely the Secretary could not divest it under any general power which has ever been given him, and it may be well doubted if this Court would uphold even Congress in legislation directed to that purpose.

In so far as it is consistent with the power of supervision necessarily vested in the political branches of the Government, this Court has always held that the various Indian tribes within their own territory retain the right to regulate and control their internal affairs.

> "From the organization of the Government to the present time, the various Indian tribes of the United States have been treated as free and independent within their respective territories, governed by their tribal laws and customs, in all matters pertaining to their internal affairs, such as contracts and the manner of their enforcement, marriage, descent, and the punishment for crime committed against each other."
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> Sah Quah, 31 Fed. Rep., 329.

"They (Indian tribes) were, and always have been,

regarded as having a semi-independent position, where they preserved their tribal relations, not as States, not as nations, not as possessed of the full attributes of sovereignty, but as a separate people, within the power of regulating their internal and social relations, and thus far not brought under the laws of the Union or of the States within whose limits they reside"

U. S. *vs.* Kagama, 118 U. S., 375.

"An Indian tribe within the State, recognized as such by the United States Government, is to be considered as a separate community or people, capable of managing its own affairs, including the domestic relations, and those persons belonging to the tribe who are recognized by the customs and laws as married persons, must be so treated by the courts, and the children of such marriage can not be regarded as illegitimate."

Earl *vs.* Godley, 44 N. W. Rep., 254.

"By the agreement confirmed in this act (March 2, 1889), these nations gave up a large amount of territory, and the rights conferred upon the nation or upon individuals were the consideration thereof. The persons entitled to such rights are the persons who at the time of the agreement constituted the Sioux Nation, and were lawful members thereof. The question, therefore, whether any particular person is or is not an Indian within the meaning of this agreement, is to be determined, in my opinion, not by the common law, but by the laws and usages of the tribes."

20 Opinions Att'y Gen'l, 711.

In the case of Sloan *vs.* U. S. (85 Fed. Rep., 197), where the question presented was whether Indians of mixed blood were to be considered as "Indians" in allotting lands to the members of the Omaha tribe under provisions requiring such allotments to be made to "Indians" of that tribe, Judge Shiras said:

> "It confers the right to an allotment upon the Indians of the Omaha tribe. It makes no discrimination with relation to mixed bloods. It must have been well known to Congress, as it unquestionably was to the Omaha tribe, that they were residing at that time upon this reservation, as members of the tribe, many persons of mixed blood; and if it was the purpose of the parties to exclude from the benefit of the act all persons who were not Indians of the pure blood, apt words to that end would have been used."

In the case at bar, the treaty provision is very much broader in its description of the parties entitled to allotment, being for "members of the tribe, native and adopted." (Art. II.)

It was "unquestionably known" to the Wichita and affiliated bands of Indians at the time the treaty or agreement was signed, June 4, 1891, that the relator was "residing at that time upon this reservation as a member of that tribe," for, as before stated, he was so recognized by the Indians themselves, in the presence of the commission negotiating the treaty or agreement, and, as a member of said tribe, signed the treaty or agreement in the presence of the Indians and of the Commission.

Had it not been the purpose of the contracting parties (the Indians and the United States), to recognize relator's right of membership "apt words" to exclude him from the benefits of such membership "would have been used." Instead of which we find that by the provisions of Article V he must have been counted and included as a beneficiary of the agreement.

In the case of Jones *vs.* Mehan (175 U. S., 1) the treaty between the Chippewa Indians and the United States contained a provision setting apart a reservation of 640 acres to Moose Dung, chief of the tribe, who entered into possession of the same. Some years afterwards, dying, his son, also named Moose Dung, entered into possession as his only heir, being the oldest son of his father by his first marriage, and entered into some leases with certain white persons, which, subsequently, becoming a matter of contest, involved the rights of others claiming as heirs; and a sum of money being in the hands of the Indian Department as rental of a part of said lands, the Commissioner of Indian Affairs directed the Indian agent for the Chippewa tribe to "fully investigate the subject as to who are the legal heirs of old chief Moose Dung, for the purpose of ascertaining to whom rent should be paid." The agent made such investigation, and reported that certain six descendants of old chief Moose Dung were his only living heirs, and entitled to share equally in his estate. The Commissioner forwarded this report to the Secretary of the Interior, recommending that these six persons be determined to be the heirs of old chief Moose Dung, and the Secretary of the Interior,

concurring in the recommendation, returned the papers, whereupon the Commissioner directed the Indian agent to distribute the proceeds of the lease in his hands in accordance with that decision. The court said:

> "The Department of the Interior appears to have assumed that, upon the death of Moose Dung, the elder, in 1872, the title in his lands descended by law to his heirs generally, and not to his eldest son only. But the elder chief Moose Dung, being the member of an Indian tribe, whose tribal organization was still recognized by the Government of the United States, the right of inheritance in his land, at the time of his death, was controlled by the laws, usages, and customs of the tribe, and not by the law of the State of Minnesota, nor by any action of the Secretary of the Interior."
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> "An Indian tribe is a separate organization, with their own laws and customs." See also
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> Stephens *vs.* Cherokee Nation, 174 U. S., 445.

Some time previous to 1830, Smith, who was a white man, intermarried with Eliza, who was an Indian woman of the Choctaw Nation. After marriage they continued to reside in the same Nation on the lands described in the bill, guaranteed by the 19th article of the treaty of Dancing Rabbitt Creek, concluded in 1830, which provides that each head of a family who cultivated 30 acres of land during the year 1830 should have three quarter sections of land, including improvements, etc. Smith located the lands in the names of himself and wife, and in 1835 sold the same to Hall, from whom the appellee derives title. The court said:

"It is unquestionably true that the treaty has reference to the head of a family living under the dominion of the Choctaw Nation; but the treaty does not say that a white man may not, according to the usages and customs of that Nation, be the head of a family. When a white man marries a woman who was a member of the Indian Nation, and adopted her domicile, whether he became the head of a family or not depended upon the law or custom regulating the rights of the parties in such case. And this is what we presume the treaty means when it speaks of the head of a family; one who is so in the Choctaw sense of the term, according to the usages and customs of that Nation."

Turner *vs.* Fish, 28 Miss., 306.

In Senter *vs.* Choctaw Nation (MSS.), decided by Judge Clayton, of the Indian Territory, the question being as to the effect of a marriage between a white man and a Choctaw Indian woman, it is said:

"The Court is of the opinion, therefore, that in order to confer the right of citizenship by marriage in the Choctaw Nation, the marriage must be a valid one under the provisions of the Choctaw laws."

And in the case of Tucker *vs.* Choctaw Nation (MSS.), a case where a white man married a Choctaw Indian woman under a license from the Clerk of the United States Court, and afterwards learning that said marriage did not confer upon him the right to become a citizen of the Choctaw Nation, he remarried the same woman in accordance with the provisions of their laws, the Court said:

"It simply had the effect of naturalizing the party. It gave the Choctaw Nation the opportunity of inquiring into his character, which was proven good. He paid the license fees and took the oath, and fully complied with the Choctaw laws, and hence was entitled to membership in that tribe."

The last-named Choctaw cases, it will be borne in mind, were decided under the written statutes of the Choctaw Nation, their laws providing expressly for intermarriage with citizens of the United States. The Wichita Indians, it is contended, have their laws also upon the same subject, which are entitled to as much consideration by the courts, when proved. It is true such laws are unwritten, and consist in the usages and customs of the tribe from time immemorial, but they are the laws of the tribe nevertheless, and are as binding as if written, and require only to be averred and proved as other facts. (Turner *vs.* Fish, Miss., 306.)

"The indictment charged that Rutherford was a 'white man and not an Indian,' but testimony was offered for the purpose of showing that, although a white man, he had been adopted into the Cherokee Nation, which, if proved, would oust the Federal Court of jurisdiction within the rule laid down in Alberty *vs.* U. S., (162 U. S. 499). In that case it was held that the courts of the Nation have jurisdiction over the offenses committed by one Indian upon the person of another, and this includes, by virtue of the statutes, both Indians by birth and by adoption. * * * Again, it is evident that Rutherford intended to change his nationality and

become a Cherokee citizen. He took the steps which the statutes prescribed, and did, as he supposed, all that was requisite therefor. He was marrying a Cherokee woman, and thus, to a certain extent allying himself with the Cherokee Nation. * * * It appears, therefore, that Rutherford sought to become a citizen, took all the steps he supposed necessary therefor, considered himself a citizen, and that the Cherokee Nation in his lifetime recognized him as a citizen, and still asserts his citizenship. Under these circumstances, we think, it must be adjudged that he was a citizen by adoption."

Nofire *vs.* 164 U. S., 657, 658, 661, 662.

See, also,

U. S. *vs.* Rogers, 4 How., 567.
Roff *vs.* Birney, 168 U. S., 218.
O'Brien *vs.* Bugbee, 26 Pac. Rep., 428.
Seneca Nation *vs.* Lemley, 8 N. Y. S., 245, 55 Hun., 83.

Departmental Construction.

The Commissioner of Indian Affairs, in his annual report of August 27, 1892, discusses very elaborately the question, "What is an Indian?"

In that discussion, referring to the matter of adoptions, he says:

"In the early history of America many white men were adopted into Indian tribes, and in accordance with the customs of those tribes become recognized as members and entitled to all the rights therein that the members of the Indian blood were entitled to enjoy. After the relations between this Govern-

ment and the Indian tribes assumed the form which has been likened to that of guardian and ward, provision was made in many of the Indian treaties for the regulation of such adoption of whites into Indian tribes, as well as for the regulation and adoption therein of Indians of different tribes, nations, or bands; and in many cases the United States has been given the right to supervise and approve or disapprove such adoption thereafter made, as the best interests of the Indian tribes would seem to demand."

Rep. Com. Indian Aff'rs, 1892, p. 33.

From this it would appear that the executive officers of the United States Government have no inherent right to sit in judgment upon the question of tribal membership, but that the tribe itself is supreme as to that question, as it is admitted to have been in the early history of America, and that such right of supervision as may now be claimed to exist, must exist alone by virtue of some law of Congress as to that particular tribe, or some treaty between that tribe and the United States conferring such authority. In the absence of such express delegation of authority, the tribe remains sovereign, as has been shown.

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The Commissioner, in the same report, further says (p. 36):

"Also where Congress has required a census to be taken of an Indian tribe (as in the case of the Chippewas, 25 Stats., 642) the roll of names submitted

> of those recognized by the Indians as members of their tribe, including half-breeds and mixed bloods, has been excepted by the Executive Departments of the Government without question as conforming to the requirements of the Statute."

In the same report the Commissioner further says (p. 37):

> "It is also worthy of consideration in this connection that the United States Government has been, and is the trustee of vast sums of Indian money, and that it has from time to time disbursed this money by paying it *per capita* to the Indians, recognizing as Indians all who are borne upon the rolls, and recognized by the Indians themselves as members of their tribes, including half-breeds and mixed bloods."

In the light of this report of August 27, 1892, and the regulations of the Indian Department (Rec., pp. 25, 26), which first provided for Departmental approval of adoptions December 28, 1893, the necessity for this approval would seem to be a new doctrine antagonistic to the decisions of the Supreme Court and discovered since the agreement of June 4, 1891, was negotiated and since the rights of relator were acquired.

Vested Rights Involved.

And we insist that the Court should not lose sight of the fact that we are dealing with the vested property rights of individuals. Before the United States had any claim to these lands, this relator owned an interest therein as an adopted member of the tribe. The agree-

ment itself declares that to those individuals who occupy the status of this relator "there shall be allotted 160 acres of land"; and, again, that "each and every member of the tribe shall have the right to select" their lands; and, finally, that if they do not select within the time prescribed, "the allotting agent in charge of the work" shall make selections for them. In other words, the whole agreement demands that every member of the tribe have an allotment.

The vested rights of individuals are in many cases to be found in the books, the subject of most serious consideration by the courts; and their preservation has been in many instances of the allowance of the writ, one of the controlling influences.

The resulting proposition is that where rights are clearly vested, and the purpose to preserve them clearly indicated, no nicely delicate regard for what an executive claims as his prerogative shall operate to destroy, imperil, or incumber the individual rights. If the Secretary's alleged power (which is not a power but a duty) were half so clearly defined as the individual rights of this relator, there might be some reason for deference to the executive; but where the rights of the appellant are determined beyond possible question, as they are in this case, and the act of the executive in denying these rights defeats the law in letter and in spirit, shall not the presumption be against such power in the executive? Shall not any doubt be resolved in favor of the right which the law establishes and for the enjoyment of which it provides?

Stevens *vs.* Cherokee Nation, 174 U. S., 641.

Conclusion.

We therefore insist—

First. That the duty of the Secretary to identify the individual as a member of the tribe does not involve judicial discretion, but we say it is not material to determine whether this was a ministerial or a judicial duty, because the answer of the Secretary and all the evidence in the case shows that he did find that this relator is a member of the tribe and his only reason for refusing to approve relator's selection of land was because he did not approve of that membership.

Second. That membership by adoption being conceded, the approval or disapproval by the Secretary of the selection is not a power but a duty; that the duty to approve selections made within the requirements of the statute is positive, that the duty of disapproving selections applies only to those made in violation of the requirements of the statute, and that the performance of the one duty or the other is positively defined by the provisions of the act giving to the Secretary no option whatever whether he shall approve or disapprove a selection.

Third. That the allotment of land selected does not constitute a bounty from the Government, but is a partial payment of the consideration for the cession of the lands of the tribe, and that the failure of the Secretary to approve this relator's selection is a forcible abatement by that much of the consideration agreed to be paid by the United States.

With the determination of these questions in favor of the proposed allottee, then, if there ever was any ju-

dicial discretion or power vested in the Secretary, it was exhausted, and nothing remained to him but the performance of the plain duty to approve the relator's selection. Were it otherwise, the Secretary could capriciously disapprove selections; and to use the language of the Court in Marbury *vs.* Madison (1 Cranch., 137), "sport away the rights of the petitioner." If he were permitted to do this in one instance he might do it in all, until he had refused to approve as to the entire membership of the tribe, and in that way invalidate the act of Congress.

But when these facts, which the Secretary now admits, are determined in relator's favor, and the Secretary's judicial functions thereby exhausted, the same obligation rests upon him to perform the ministerial duty following upon the exercise of his judgment, as was enforced by the judgment of the Court in the case of U. S. *vs.* Schurz (102 U. S., 378), where, after once passing upon the right of the claimant to a patent, the Secretary was required to deliver it.

If in this case the courts have not power to enforce the plain mandates of this agreement and statute, it will present a condition which has often been said to involve a monstrous absurdity in organized government; that there should be no remedy, though a clear undeniable right is shown to exist.

Kendall *vs.* U. S., 12 Pet., 62.

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Attorneys for Plaintiff in Error.

IN THE SUPREME COURT OF THE UNITED STATES.

October Term, 1906.—No. 194.

THE UNITED STATES, Ex-Relatione WILLIS C. WEST, Plaintiff in Error,
vs.
ETHAN A. HITCHCOCK, Secretary of the Interior, Defendant in Error.

Affidavit of Walter S. Field, Showing Value of Land in Controversy in this Suit.

DISTRICT OF COLUMBIA, *ss*:

Before me, M. S. W. Day, a notary public in and for said District, personally appeared Walter S. Field, who, being duly sworn by me on oath, deposes and says:

I reside at Oklahoma City, in the Territory of Oklahoma, and am now and have been for many years familiar with the values of real estate in the Territory generally and especially in the Wichita reservation. I am well acquainted with the 160 acres claimed by the relator, Willis C. West, in this suit, and know its value. The real estate unimproved is worth not less than $5,000. The improvements which are on it now are, so far as I know, the same as those which were there at the time West selected the land and applied to have it allotted to him. These improvements were made by West himself during his occupancy of the property and were worth, at the time he left the property, not less than $2,000, and are, in my judgment, now worth about the same sum.

WALTER S. FIELD.

Sworn to and subscribed before me this third day of December, 1906.

[SEAL.]

M. S. W. DAY,
Notary Public.